

***REDSTONE ARSENAL***

***LEGAL ASSISTANCE***

***ALABAMA DIVORCE***



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# **DIVORCE IN ALABAMA**

**Please note that this Information Paper only provides basic information and is not intended to serve as a substitute for personal consultations with a Legal Assistance Attorney.**

## ***Divorce v. Legal Separation***

In some instances a couple with marriage problems may wish relief short of divorce. They may object to divorce because of religious convictions or in order to retain health insurance military benefits. In a divorce from bed and board, commonly called a "legal separation," or in a suit for separate maintenance, the parties remain married after the legal proceedings. Before a decree of legal separation can be issued, the court must determine that the jurisdictional requirements for the dissolution of a marriage have been met. As in a divorce, legal separation and separate maintenance consider custody of the children, child support, alimony, and property use or division. During the legal separation or separate maintenance, either party can sue for a divorce on one or more grounds cited above.

Legal assistance can also help prepare a contractual separation agreement. This is a less formal interim alternative that outlines any voluntary agreements made between the spouses. A separation agreement is notarized and legally enforceable.

## ***Common Law Marriage***

The intent of the parties to be husband and wife is the essential element. The intent can be proven by the parties holding themselves out to others as husband and wife. Once a common law marriage is established, it is no different from a ceremonial marriage. It can only be dissolved by divorce.

## **GROUND**

Alabama has many grounds for divorce. Some of these grounds are: voluntary abandonment for one year, physical cruelty, adultery, addiction to alcohol or drugs, incompatibility of temperament, and irretrievable breakdown of the marriage. These last two grounds are the basis for what is commonly called "no-fault" divorce. This simply means that the parties want a divorce because they are unable to get along to such an extent that the marriage has suffered irreparable damage. No proof of fault is necessary, although it may be considered by the judge on trial. Most divorces can be obtained on "no-fault" grounds.

## **RESIDENCY**

There is a residency requirement that must be satisfied in order for an Alabama court to have jurisdiction to grant a divorce. This requirement is satisfied if both parties or the defendant permanently resides in Alabama. If the defendant does not reside in Alabama, the plaintiff must

have been a bona fide resident of Alabama for six (6) months immediately preceding the filing of the divorce complaint. There are limited exceptions which may apply.

Divorce must be filed in (1) the county of the defendant's residence, (2) the county of defendant's residence when separation occurred, or, (3) if the defendant is a nonresident, then in the county in which the other party to the marriage resides. Persons in military service and spouses living in Alabama are deemed residents of Alabama for the purpose of maintaining suits at law and equity in this state. However, if either party is an Alabama resident, divorce may be filed in any county if the defendant fails to object.

Petitions to modify divorce decrees may be brought at the custodial parent's option in the county where the custodial parent has resided for the last three (3) years or in the county where the divorce was granted. If the non-custodial parent files the petition to modify, the custodial parent may choose the venue.

Divorce proceedings may consist of several events and phases: fact-gathering from you, attempts to achieve an uncontested divorce, filing the complaint, information-gathering from your spouse, records and witnesses, any settlement negotiations, and the trial.

## **DIVORCE PROCEEDING**

### ***Starting the Proceedings***

A divorce case begins with the filing of a complaint in the Circuit Court. Costs vary among the counties. The party filing the complaint is the plaintiff and the opposing party is the defendant. The complaint is normally filed in the county where the defendant resides or where the parties resided at the time they separated.

### ***Service of the Complaint***

The law of Alabama requires that the defendant must be made aware of the suit for divorce. This procedure is known as service of process. When a divorce complaint is filed, a request is made for the sheriff to deliver a copy, of the complaint to the defendant or for the court clerk to mail a copy by registered mail to the defendant's last known address. To avoid the embarrassment often associated with being served by the sheriffs, the defendant may sign a waiver acknowledging receipt of a copy of the complaint. If your spouse has a lawyer, your spouse may authorize the lawyer to accept service. In some cases, service may be achieved by publishing notice in a newspaper.

## **UNCONTESTED DIVORCE**

An uncontested divorce can often be obtained quickly and at less expense than a contested divorce. It can only occur when both parties agree to all of the terms of the divorce. It is often therapeutic for parties to work out a divorce agreement. Disputes over child custody, child support, visitation rights, alimony, or property division, will prohibit an uncontested divorce.

## **SEPARATION**

The law does not require the parties to be physically separated and living apart on filing the divorce complaint. However, some judges may require it.

## **RECONCILIATION**

We have an ethical obligation to explore the possibility of reconciliation between you and your spouse. After the divorce is filed, both of you may change your mind and try to work out your marital problems. Our policy is to encourage such efforts. The divorce proceedings can be dropped at any time of your choosing. We will recommend marriage counselors at your request.

## **DATING**

Since you are still married until divorce is granted, it is generally not a good idea to date during the divorce proceedings as doing so may have an adverse effect on your case.

## **CHILD CUSTODY**

Alabama courts look to the "best interests of the children" and seek to determine which parent is most fit to receive primary custody. "Best interests" factors include looking at who has been the primary caretaker, possible emotional or physical abuse history, educational or medical needs, locality issues, etc. The desires of older children are often considered by the judge. Regardless of which parent is granted custody, the other parent will be granted reasonable visitation rights, except in extreme circumstances. Joint custody may be an alternative, but many judges do not favor it. For more information on child custody, read the Child Custody information paper.

## **FAMILY SUPPORT**

Both DOD Policy and state law require servicemembers to provide financial support to their family members. If servicemember is not providing support or for questions concerning how much servicemember should be providing, contact your local legal assistance office.

## **ALIMONY**

Alimony is the money paid by one spouse to the other, in recognition of the duty to support and maintain the other spouse. Alimony is available in Alabama. The amount and duration of alimony awarded is different in every case. Some of the facts considered by the judge in awarding alimony are length of the marriage and age of the parties, assets and liabilities, income, earning capabilities, the degree of fault of the parties in causing the divorce, stations in life, and health. Alimony terminates upon petition and proof that the receiving spouse has married or is living or cohabiting with a member of the opposite sex.

## **PROPERTY DIVISION**

Unlike community property states, there is no formula in Alabama for determining how the property (land, money, automobiles, household, goods, etc. ) will be divided.

If the parties can reach a reasonable agreement, the judge will generally approve it. Otherwise, the judge will make a decision considering such factors as the length of the marriage, relative earning capacities, assets and liabilities, custody of the children, and the fault of the parties in causing the divorce.

### **DIVISIBILITY OF MILITARY RETIREMENT PAY**

Military retirement benefits are considered marital property and are often divisible in a divorce. They are also a source of income for alimony.

State court may consider military retiree pay as marital property which may be expressed either in dollars or as a percentage which cannot exceed fifty (50) percent. The court cannot consider the soldier's disposable retired pay as property unless the court has jurisdiction over the soldier's residence (other than because of military assignment), the soldier's domicile in the state, or the soldier's consent to the court's jurisdiction.

### **TEMPORARY RELIEF**

Under certain conditions, the judge may give temporary relief before the divorce is finalized. On showing of the potential for irreparable harm, the judge may prohibit any party from harming or harassing his or her spouse, and from selling property belonging to the parties. It is important to tell your attorney if you are afraid your spouse will harm you or your children in any way. The judge may direct a spouse, usually the husband, to move out of the house pending the trial. The judge may also grant temporary relief by awarding custody of the children, requiring the payment of child support and alimony, setting visitation rights, and requiring payment of attorney fees, all pending trial.

### **PROTECTION FROM ABUSE**

The Alabama Protection from Abuse Act provides authority for the court to make any orders necessary to bring about cessation of abuse, including possession of residence, and temporary custody and support.

### **NAME AFTER DIVORCE**

The wife will be granted the right to resume her maiden name or name by a previous marriage if she so requests.

### **SETTLEMENT V. TRIAL**

Usually the final proceeding in a divorce action is the trial. Although it will vary among the counties, you can expect a trial approximately six (6) months after the complaint is filed.

Divorce actions are tried before a judge and not a jury. Prior to trial both parties are obligated to explore the possibility of a settlement throughout the divorce proceedings. A settlement made merely to avoid a trial is not wise.

### **RIGHT OF PARTIES TO REMARRY AFTER DIVORCE**

Neither party shall again marry, except to each other, until sixty (60) days after the decree is rendered; and, if an appeal is taken, neither party shall again marry except to each other during the pendency of the appeal.

### **INCOME TAX CONSEQUENCES OF DIVORCE**

Generally, most people do not consider the tax consequences of a divorce until the time come to file an income tax return. Nevertheless, many issues can arise in regard to taxes as a result of a divorce. Although not all-inclusive, the sections below summarize some of the pertinent considerations and consequences of divorce on taxation.

#### ***Which parent can claim a child as a dependent for the exemption?***

Normally the parent that has custody of the child gets to claim the exemption deduction however, some divorce decrees state that IRS Form 8332 will be filed giving the non custodial parent the right to claim the child as an exemption. Therefore, first look at the decree, if it is silent, then a safe assumption is that the custodial parent will be entitled to the exemption as long as the custodial parent provides more than one half of the child's total support for the year.

#### ***What type of return should be filed for the year the divorce took place?***

Separate returns (single or head of household) are required if spouses are divorced under a decree or an order of separate maintenance has been issued. If a divorce or separation is not final, the spouses should consult with their attorneys to discuss the advantages and disadvantages of married filing separate or joint returns. Taxpayers with children should consult your military tax specialist to see if you are Qualified for Head of Household.

#### ***Does alimony have to be included as income if it is received, and does the party paying alimony get deduction for alimony paid?***

Amounts paid during an individual's taxable year for alimony or separate maintenance are Deductible. IRC 215(a). Amounts received as alimony or separate maintenance payments are included in gross income. IRC 72(a).

#### ***What type of payments will be considered alimony by the IRS?***

The term "alimony or separate maintenance payment" is defined by the Internal Revenue Code (26 U.S.C § 71) as being "any payment in cash if—

- (a) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
- (b) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,
- (c) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
- (d) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

***What are the excess Front Loading Rules?***

If alimony payments in the first years exceed the average payment in the second and third year by more than \$15,000, the excess amounts are recaptured in the third year by requiring the payor spouse to include the excess in income and allowing the payee spouse to deduct the excess amount. A similar rule applies if payment in the second year exceed payments in the third year by more than \$15,000. IRC 71(f). Temporary support payments are not subject to recapture. IRC 71(f)(5)(B).

***Can child support payments be deducted, and does the receipt of child support require inclusion in income?***

Payments made for the support of children under a divorce or separation decree are not deductible by the payer spouse or includable in the gross income of the payee spouse. IRC 71(c). Payments that are partially alimony and child support are considered to first satisfy the child support obligation and secondly alimony.

***If a Joint tax return is filed, are both spouses liable for the tax?***

Husband and wife are jointly and severally liable for the tax on a Joint tax return. IRC 6013(d)(3).

***What happens if one spouse innocently signs a return and the other spouses entered fraudulent information?***

1. A spouse who innocently signs a return that understates income can be relieved of liability if such spouse qualifies as an "innocent spouse". IRC 6013(e).
2. In order to be granted innocent spouse relief:
  - a) The spouses must have filed a valid Joint return. IRC 6013(e)(1)(A);
  - b) There must be a substantial understatement of tax (\$500 or more). IRC 6013(e)(1)(B).

- c) The understatement must be caused by a grossly erroneous item;
- d) The spouse must establish that he or she did not know, or did not have a reason to know that there was substantial understatement on the joint return. IRC 6013(e)(1)(C).
- e) It must be inequitable to hold the spouse liable for the tax. IRC 6013(e)(1)(D).

### **GENERAL SUGGESTIONS**

Your well-meaning friends may offer you advice about your case. You may hear tales about awards in other divorce cases. The facts surrounding your marriage, divorce, children, and property are unique and they differ from every other case. Divorce proceedings are very emotional and, at times, parties use them to seek revenge. Children are often used by a parent to punish the other parent. Prepare your children properly without poisoning their minds about your spouse. Attempt to cooperate with your spouse when the children are involved.

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